93-151

No.

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1994

CLIFF GREENE, pro se,

Petitioner,

vs.

NEW YORK STOCK EXCHANGE, INC.; Arbitration Department; ROBERT CLEMENTE; ROY ROWSELL, Arbitration Counsel,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CLIFF GREENE, pro se
1333 President Street
Brooklyn, New York 11213
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APP

QUESTION PRESENTED

1. Whether the District Court committed reversible error when it dismissed pro se petitioner's complaint on Defendants motion for lack of subject matter jurisdiction. The jurisdiction of the court was invoked pursuant to 28 U.S.C., Sec. 1331—Federal Question.

2. Whether the District Court committed reversible error when it dismissed petitioner's pendent claims and Federal claims without properly considering petitioner's Federal Question, basis for invoking Federal jurisdiction.

3. Whether the District Court committed reversible error when it dismissed pro se petitioner's complaint on grounds that petitioner has failed to join an indispensable party. (Merrill Lynch).

4. Whether the District Court committed reversible error when it extended arbitral immunity to NYSE Arbitration Department (the sponsor of arbitration). Was it not unconstitutional since the offence was committed by the sponsor of arbitration and not by the arbitrators.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Cliff Greene, pro se, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit. Affirmed, substantially for the reasons set forth in the Memorandum and Order of Judge Pierre N. Leval, dated April 30, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and appears in Appendix A to this Petition. The unpublished written Opinion of the District Court for the Southern District of New York appears in Appendix B to this petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on April 27, 1993. This court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

Constitutional and statutory provisions involved Amendment XIV to the constitution is set forth in Appendix C.

STATEMENT OF THE CASE

The United States District Court, Southern District of New York, had jurisdiction pursuant to Title 28, U.S.C., Section 1331—Federal Question.

On October 22, 1991, a three (3) member panel of New York Stock Exchange (NYSE) arbitrators, unanimously ruled that the out of pocket losses suffered by the petitioner, was, as the result of negligence on the part of Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch").

This decision was based on *the pleadings, the testimony given,* and *the evidence presented.* (Re: NYSE letter dated November 18, 1991, addressed to Petitioner).

The above mentioned findings were passed on to the NYSE Arbitration Department (arbitration sponsor) for paper work completion.

Upon completion, Merrill Lynch, was informed by NYSE letter and copy of arbitrators decision. Same, dated October 28, 1991, to promptly remit the amount of $30,000.00 awarded to petitioner.

The petitioner's pleadings, for out of pocket losses were—$130,437.50 — Compensatory damages—$1,130,437.50.

The amount in controversy are as follows:

Total out of pocket losses	$ 130,437.50
Arbitration award	$ 30,000.00
Amount in controversy	$ 100,437.50
Total compensatory damages	$1,130,437.50
Arbitration award	$ 30,000.00
Amount in controversy	$1,100,437.50

Upon receipt of the above mentioned, $30,000.00 award, the petitioner notified the NYSE arbitration department in a letter dated November 4, 1991, of his not being satisfied with being deprived of the difference between the pleadings and the award (the amount in controversy).

The arbitrator's unanimous decision in favor of the petitioner, was based on the pleadings of $130,437.50 out of pocket losses and, not the awarded $30,000.00.

The NYSE response to the above dis-satisfaction came in a letter dated November 18, 1991. The last par. of that letter, reads as follows:

There is no appeal procedure through the NYSE. If you feel you have valid grounds to appeal this decision, you must seek to have the award vacated by the courts—expeditiously.

In this same letter, NYSE stated, that the decision of the arbitrator's was made prior to them being presented with and completing and signing the decision form. The petitioner, alleged otherwise; the arbitrator's unanimous decision in favor of petitioner for the out of pocket losses ($130,437.50) based on the pleadings were signed and sent to the NYSE arbitration department for the completion of the paper work. There were clerical errors in figures mentioned in the letter. The letter and the decision forms are on file with the courts. (Mark—Exhibit B).

The petitioner, proceeding pro se, on January 21, 1992, filed a complaint, against NYSE, demanding trial by jury, in United States District Court, Southern District of New York. 92 Civ. 0512 (PNL).

The respondent move for dismissal based on the following grounds:

1—The District Court, lacks subject matter jurisdiction over plaintiff's claims.

2—Plaintiff has failed to join an indispensable party (Merrill Lynch), the adversary in arbitration.

3—Defendants are immune from suit for actions taken in sponsoring the arbitration.

The court concluded that the defendants are entitled to dismissal by reason of their immunity, and that it was not necessary to reach a decision on the numbers 1 and 2 of above mentioned grounds.

The decision in the above mentioned case, herein at Appendix "B".

The petitioner, proceeding pro se, on August 06, 1992, filed his brief on appeal from the United States District Court for the Southern District of New York.

The District Court decision was affirmed substantially for the reasons set forth in the memorandum and order of Judge Pierre N. Leval, dated April 30, 1992.

The decision in the above mentioned case, herein at Appendix "A".

The lost of six (6) yeears of interest on out of pocket losses of $130,437.50 was not included in the $30,000.00 award—and no punitive damages were paid. What could be more unfair and unjust? A request was made for arbitration under Federal Arbitration Act—Title 9 U.S.C., since federal questions were involved. The requests were denied.

REASONS FOR GRANTING THE WRIT

1. The District Court Committed Reversible Error When It Dismissed Pro Se Plaintiff's Complaint on Defendants Motion for Lack of Subject Matter Jurisdiction.

Under Federal Rules, U.S. Code Title 28, Section 1331-Federal Question: it is the Federal District Courts that have original jurisdiction of all civil sections wherein the matter; in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the constitution, laws, or treaties of the United States, except that so such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity, in short, application and interpretation of Federal laws, are the responsibility of Federal Courts.

No way, can the lower court, arbitrary and capriciously, as in this case, relinquish responsibility; the allegations are of a Federal Question—Constitutionally protected property rights are a Fundamental right, petitioner contends that the amount in controversy is the proport of the petitioner.

One's constitutional rights may not be diminished or restrained by denial of privilege granted by law or regulation. *See* 14. Amend. and 5. Amend. Also, *See* Smartt vs. Avery, C.A. Tenn. 1967. 370 F. 2d 788.

Title 9 U.S.C., Sec. 10-10(c) Note 7-8-and 18 (arbitration) does give Federal Court's subject matter jurisdiction. It clearly states that the amount in controversy determines Federal Courts' subject matter jurisdiction and not the granted award.

2. The District Court Committed Reversible Error When It Dismissed Pro Se Petitioner's Pendent Claims and Federal Claims Without Properly Considering Petitioner's Federal Question, Basis for Invoking Federal Question.

9 U.S.C., Sec. 10-10(c) Notes 7-8-and 18. (Arbitration) does give Federal Court's subject matter jurisdiction. It clearly states that the amount in controversy determines Federal Courts subject matter jurisdiction and not the granted award.

Therefore, since 9 U.S.C., Sec. 10. gives the court an independent basis F or subject matter jurisdiction, Petitioner relied upon the all writs Act, 28 U.S.C., Sec. 1651, as an ancillary-jurisdiction. *See* In re Baldwin-United Corp., 770 F. 2d 328, 335 (2d Cir. 1985). When a Federal Court has jurisdiction over its case in Chief, the all Writs Act grants it ancillary. Jurisdiction to issue writs "Necessary or appropriate in aid of "That Jurisdiction."

> (a) The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principle of law. 1651(a) is an extraordinary remedy which may be issued only "under circumstances compelling such action to achieve Justice." Thus, the remedy has been limited to situations of clear deprivation of statutory and constitutional rights or complete miscarriage of Justice and just plain fundamental fairness.

Petitioner contends that Justice was not served in this case, the $130,437.50 was the property of the Petitioner. One's property rights are constitutionally protected and may not be diminished or restrained by denial of privilege granted by law or regulation. *See* Smart v. Avery, C.A. Tenn. 1967. 370 F. 2d 788. *See* Taking Clause-U.S. Const. Amend. XIV.

3. The District Court Committed Reversible Error When It Dismissed Pro Se Petitioner's Complaint on Grounds That Petitioner Failed to Join an Indispensable Party. (Merrill Lynch).

Pursuant to Fed. R. Civ. P.-Rule 19, Petitioner contends that since the alleged indispensable party, Merrill Lynch Pierce Fenner & Smith, Inc. has no liability in the real issue before this court, and played no part or role in the fraudulent acts committed by the Respondent against the Petitioner—therefore, is not a feasible party to be enjoined or needed for just adjudication.

The decision to deprive Petitioner of the difference between the awarded $30,000.00 and his pleadings of out of pocket losses of $130,437.50—was the sole decision of the Respondent and not that of Merrill Lynch.

The Petitioner has been an investor in the stock market for forty (40) years, and for each of those forty years there has been allegations that the New York Stock Exchange Arbitration Department was a tool of the Exchange that rules more favorably for its members (Brokerage Houses) than that of investors. This case is an example of those allegations.

The arbitrators ruled unanimously in favor of the Petitioner—the pleadings were for out of pocket losses of $130,437.50. The decision was allegedly based on the pleadings and all the evidence and testimony presented at the hearings in this matter.

We ask this Court who really won? The Petitioner received $30,000.00, but, Merrill Lynch, the Member Firm, the defendant won a savings of $100,437.50. Is that fairness—is that justice?

Therefore, Petitioner respectfully request that you vacate the $30,000.00 award and in its place make an award that is fair and just. 9 U.S.C., Sec. 10-10(c) Notes 7-8-and 18. gives the Court that authority. *See* 9 U.S.C.A. Sec. 10(c) Roche v.

Local 32B-32J service employees intern. Union, 755 F. Supp. 622.

Petitioner further contends that Fed. R. Civ. P. Rule 21. Misjoinder and non-joinder of parties is not grounds for dismissal of an action.

> Rule 21. Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Merrill Lynch, the alleged "indispensable party played no role or part in making the decision to deprive Petitioner of the amount in controversy. Therefore, has no responsibility or obligation in the matter before this court. It is solely that of the Respondent. *See* Fed. R. Civ. P. Rule 12(h) (s), as amended; C.F. Rule 12(b) (7), as amended).

When the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a) (2) (ii), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a) (2) (i), his undue delay in making the motion can properly be counted against him as a reason for denying the motion.

4. The District Court Committed Reversible Error When It Dismissed Pro Se Petitioner's Complaint on Grounds That Defendants Are Immune From Suit for Actions Taken in Sponsoring the Arbitration.

The NYSE Arbitration Department, the sponsor of arbitration, should not have been extended arbitral immunity in this case. Why? Because the offence was committed by the

NYSE, the sponsor; and not the arbitrators. It was the sponsor who deprived the Petitioner of the amount in controversy. Thereby, depriving the petitioner of his constitutional protected property rights.

Petitioner contends that the amount in controversy is the property of the petitioner and the deprivation of that property by NYSE diminishes and restrains Petitioner's constitutional rights. It reduces the potential returns on the property's earnings and potential capital gains.

Property rights are a fundamental right, a constitutional protected right. One's constitutional rights may not be diminished or restrained by denial of privilege granted by law or regulation, let alone NYSE, a private corporation licensed to do business in the State of New York. It has as its members fees paying stock brokerage firms. It rules more times than not in favor of its membership as opposed to investors.

Further, no American citizen constitutional rights may be violated with immunity. *See* 14. Amend. and 5. Amend. Also, *see* Smartt vs. Avery, C.A. Tenn. 1967, 370 F. 2d 788.

The NYSE, as a sponsor of arbitration, is unconstitutional. It has a built in conflict of interest. Re: Stock Brokerage Firm as Members.

The lower court abused its discretion by dismissing petitioner's claim and complaint.

The NYSE was and still is subject to a section of the civil rights statute that allows people to sue entities that deprive them of their rights. *See* title 42 U.S.C., Sections 1981 and 1983.

42. U.S.C., Sec. 1981

Sec. 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the

security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C., Sec. 1981 Ch. 21 Note 12

Purpose of this section is to enforce U.S.C.A. Constitution Amend. 14 *Davis v. Foreman*, C.A. Ill. 1958, 251 F.2d 421, Certiorari denied 78 S. Ct. 1137, 356 U.S. 974, 2 L. Ed. 2d 1148. See also Chicago's Last Dept.

Constitutional and statutory civil rights are for protection of persons against discriminatory legislation or treatment. *Mosher v. Berine*, C.A., Mo. 1966, 357 F.2d 638.

42 U.S.C., Sec. 1983

Sec. 1983. Civil action for deprivation or rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Under this section governing civil action for deprivation of rights, plaintiff can generally sue to enforce federal statutory rights as well as constitutional rights. *Boxall v. Sequoia Union High School Dist.* D.C. Cal. 1979, 464 F. Supp. 1104.

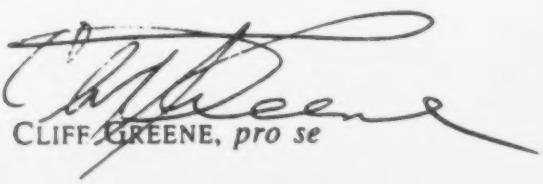
This section (1983) is federal remedy which protects only Federal Constitutional rights. *Somers v. Strader*, D.C. N.C. 1977, 435 F.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.[2]

Dated: July 22, 1993.

Respectfully Submitted,



CLIFF GREENE, *pro se*

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[2] If this court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the court of appeals for redetermination in light of this court's opinions in *Murray*, *supra*, and *Sequra*, *supra*.

No.

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CLIFF GREENE, pro se,

Petitioner,

v.

NEW YORK STOCK EXCHANGE, INC.; Arbitration Department; ROBERT CLEMENTE; ROY ROWSELL, Arbitration Counsel,

Respondent.

PROOF OF SERVICE

I Cliff Greene, , do swear or declare that on this date July 26 , 1993, pursuant to Supreme Court rules 29.3. and 29.4. I have served the attached petition for a writ of certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, N.Y. 10005
212-530-5000
(RB-7560)

Cliff Greene

CLIFF GREENE, *pro se*

Subscribed and sworn to before me
this 26th day of July 1993

F. Marc Strano

Notary public in and for said
County and State

F. MARC STRANO
Notary Public, State of New York
No. 31-4912481
Qualified in New York County
Commission Expires March 7, 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of April, one thousand nine hundred and ninety-three.

PRESENT: HONORABLE GEORGE C. PRATT,

HONORABLE DENNIS G. JACOBS,
Circuit Judges,

HONORABLE WHITMAN KNAPP,
District Judge of the United States District Court for the Southern District of New York, sitting by designation.

----------X

CLIFF GREENE,,

Plantiff-Appellant,

against

NEW YORK STOCK EXCHANGE, INC.; ARBITRATION DEPARTMENT; ROBERT CLEMENTE; ROY ROWSELL, Arbitration Counsel.

Defendants-Appellees.

Docket No. 92-7665

Filed
April 27, 1993

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This appeal from a judgment of the United States District Court for the Southern District of New York came on to be heard on the transcript of record and was argued by appellant, *pro se*, and by counsel for the appellees.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgment appealed from is hereby AFFIRMED, substantially for the reasons set forth in the Memorandum and Order of Judge Pierre N. Leval, dated April 30, 1992.

/s/

GEORGE C. PRATT, *U.S.C.J.*

/s/

DENNIS G. JACOBS, *U.S.C.J.*

/s/

WHITMAN KNAPP, *U.S.D.J.*

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

CLIFF GREENE,

Plaintiff,

against

NEW YORK STOCK EXCHANGE, INC., et al.,

Defendants.

----------X

92 Civ. 0512 (PNL)

MEMORANDUM AND ORDER

April 30, 1992

Filed May 4, 1992

PIERRE N. LEVAL, U.S.D.J.

Plaintiff Cliff Greene brings this action *pro se* against the New York Stock Exchange, Inc. ("NYSE") as the sponsor of an arbitration proceeding which plaintiff brought, as claimant, against the brokerage house of Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch"). Also named as defendants are the Arbitration Department of the NYSE, as well as Robert Clemente and Roy Roswell, two employees of the NYSE who are purportedly involved in the administration of arbitration at the NYSE. Merrill Lynch, the respondent in the arbitration, is not named as a defendant in this action.[1]

In the arbitration proceeding, plaintiff had claimed against Merrill Lynch for $1,130,437.50 in compensatory damages, plus $4,000,000 in punitive damages. He received an award in his favor for $30,000, which apparently was paid by Merrill Lynch. In this suit, plaintiff seeks to recover, under

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[1] Nor has plaintiff sued the arbitrators.

various civil rights theories, the amount of compensatory damages he claimed in arbitration to the extent they exceeded the award.[2]

Defendants move to dismiss.

Background

Plaintiff entered into a brokerage contract with Merrill Lynch that provided, *inter alia*, that any disputes pertaining to securities transactions performed by Merrill Lynch for plaintiff were to be submitted to arbitration sponsored by defendant NYSE. A dispute arose between plaintiff and Merrill Lynch concerning securities transactions. Pursuant to the agreement between plaintiff and Merrill Lynch, the parties submitted the dispute for arbitration under the auspices of the NYSE. On October 22, 1991, a three member arbitration panel rendered an award in plaintiff's favor for $30,000 against Merrill Lynch.

Plaintiff contends that the arbitrators awarded him less than he had sought in the arbitration because of racial bias, fraud and fundamental unfairness.

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[2] Plaintiff's complaint is somewhat ambiguous as to the relief sought. In several places in his complaint, Greene states that he is asking the court to "vacate" the arbitral award. *See* Complaint at 4, 27. However, the complaint also states, "Plaintiff-Claimant, would like to make it crystal clear, that this is not a challenge to the award, however, it is a challenge for the *difference between* the award, ($30,000.00) and the pleadings [in the arbitration], ($1,130,437.50 - compensatory damages, of which $130,437.50 represents actual out of pocket losses)". Complaint at 4 (emphasis original). Moreover, plaintiff emphasized in a conference before the court on April 24, 1992, that he is not challenging the arbitral award, but rather seeking to recover the difference between the arbitral award and the amount to which he believes he was entitled.

Discussion

Defendants move to dismiss on the grounds that defendants are immune from suit for actions taken in sponsoring the arbitration.[3] The court agrees.

Because of the " 'functional comparability' of the arbitrator's role in a contractually agreed upon arbitration proceeding to that of his judicial counterpart, the Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity." *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2d Cir.), *cert. denied*, 111 S. Ct. 141 (1990). This circuit extends the arbitrators' immunity to the organization sponsoring the arbitration:

> [e]xtension of arbitral immunity to encompass boards [that] sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illus[ory]. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring organization.

Id. (quoting *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir. 1982)). Accordingly, the NYSE and its arbitration department are immune from civil liability arising out the arbitration between plaintiff and Merrill Lynch. Moreover, the rationale of *Austern* mandates that the cloak of arbitral immunity covering sponsoring organizations extend to employees of the sponsoring organization who are involved in

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[3] Defendants also contend that the complaint should be dismissed because this court lacks subject matter jurisdiction over plaintiff's claims, and because plaintiff has failed to join an indispensable party (Merrill Lynch, the adversary in arbitration). As the court concludes that the defendants are entitled to dismissal by reason of their immunity, it is not necessary to reach those contentions.

the administration of the arbitration. Accordingly, defendants Robert Clemente and Roy Roswell, who are purportedly involved in administrating arbitration at the NYSE, are immune from civil liability for claims arising out of the arbitration between plaintiff and Merrill Lynch.

As all defendants possess arbitral immunity with respect to the arbitration between plaintiff and Merrill Lynch, the complaint must be dismissed for failure to state a claim.

Conclusion

Defendants' motion to dismiss is granted. This action is dismissed with prejudice.

SO ORDERED:

/s/

PIERRE N. LEVAL *U.S.D.J.*

Dated: April 30, 1992
New York, New York

APPENDIX C

AMENDMENT XIV TO UNITED STATES CONSTITUTION CITIZENSHIP RIGHTS NOT TO BE ABRIDGED

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

CLIFF GREENE,

Plaintiff,

against

NEW YORK STOCK EXCHANGE, INC., et al.,

Defendants.

----------X

92 Civ. 0512 (PNL)

CIVIL JUDGMENT

Filed May 13, 1993

Defendants having moved to dismiss, and the said motion having come before the Honorable PIERRE N. LEVAL, U.S.D.J., and the Court thereafter on May 4, 1992, having handed down its memorandum and order; granting defendants' motion to dismiss, and dismissing the action with prejudice, it is,

ORDERED, ADJUDGED AND DECREED: That defendants' motion to dismiss be and it is hereby granted, and it is further,

ORDERED, that the action be and it is hereby dismissed with prejudice.

/s/

JAMES M. PARKISON, *Clerk*

Dated: New York, New York
May 13, 1992

Supreme Court, U.S.
FILED
AUG 26 1993
OFFICE OF THE CLERK

No. 93-151

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CLIFF GREENE, *pro se*,

Petitioner,

vs.

NEW YORK STOCK EXCHANGE, INC.; Arbitration Department; ROBERT CLEMENTE; ROY ROWSELL, Arbitration Counsel,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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* *Counsel of Record*

Of Counsel
MILBANK, TWEED, HADLEY & MCCLOY

BEST AVAILABLE COPY

QUESTION PRESENTED

Was the District Court's dismissal of petitioner's claims against a sponsor of an arbitration proceeding under the doctrine of arbitral immunity improper when the dismissal was based on agreement among the Courts of Appeals that have addressed the issue that arbitral immunity applies to sponsors of arbitrations?

STATEMENT PURSUANT TO RULE 29.1

Respondent New York Stock Exchange, Inc. has no parent company. Each of its subsidiaries is wholly owned, except for Securities Industry Automation Corporation.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is an action brought by petitioner *pro se* against respondent New York Stock Exchange, Inc. (the "Exchange") based on the Exchange's role as the sponsor of an arbitration proceeding commenced by petitioner against the brokerage house of Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch"). Petitioner also named as defendants two employees of the Exchange's arbitration department, respondents Robert Clemente and Roy Rowsell.

In the arbitration, petitioner obtained a $30,000 award in his favor. Petitioner has been paid the award by Merrill Lynch. Pet. at 3[1]. Petitioner had sought approximately $1.1. million in compensatory damages and $4 million in punitive damages. Pet. at B-1. In his complaint against the Exchange and its employees, petitioner appeared to allege that the arbitrators selected by the Exchange had awarded him less than what he had sought because of racial bias, fraud and fundamental unfairness. Petitioner contends that he is entitled to damages in the amount of approximately $1.1 million, which is the difference between the amount of compensatory damages he sought in the arbitration and the amount he was awarded. Petitioner purported to bring his claims against the Exchange under the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983, and the Federal Arbitration Act, 9 U.S.C. § 10. Pet. at 2-10, B-2.

REASONS FOR DENYING THE WRIT

Summary of Argument

The Court of Appeals for the Second Circuit affirmed the District Court's dismissal of petitioner's claims "substantially for the reasons set forth" in the District Court's decision. Pet. at A-2. Contrary to petitioner's misstatements in his petition, the District Court dismissed petitioner's claims solely on the ground that the Exchange and its employees are immune from civil liability under the well-established doctrine of arbitral immunity with respect to the Exchange's sponsorship of the arbitration. Pet. at B-3.

The District Court relied on the uniform precedent among the Courts of Appeals that arbitrators enjoy absolute immunity from civil liability because their role in an arbitration is "functionally comparable" to that of a judge. Pet. at B-3.

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[1] "Pet." refers to the Petition For A Writ Of Certiorari.

Based on this reasoning, and the agreement of the Courts of Appeals that have addressed the issue that arbitral immunity extends to sponsors of arbitration proceedings, the District Court properly held that the Exchange and its employees were immune from civil liability with respect to petitioner's claims. Pet. at B-3 (citing *Austern v. Chicago Bd. Options Exch.*, 898 F.2d 882, 886 (2d Cir.), *cert. denied*, 498 U.S. 850 (1990)); *see Ozark Air Lines, Inc. v. National Mediation Bd.*, 797 F.2d 557, 564 (8th Cir. 1986) (arbitral immunity extends to sponsors of arbitrations); *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982) (same).

Moreover, the District Court's decision does not conflict with any decision of any of the Courts of Appeals regarding the doctrine of arbitral immunity and is consistent with the reasoning of this Court concerning quasi-judicial immunity, as set forth in *Butz v. Economou*, 438 U.S. 478 (1978), and *Imbler v. Pachtman*, 424 U.S. 409 (1976). The District Court's decision involved nothing more than the application of a settled and uniformly-accepted legal doctrine to facts that fell easily within the scope of that doctrine. It is inappropriate for consideration by this Court.

I.

THE DISTRICT COURT PROPERLY INVOKED THE DOCTRINE OF OF ARBITRAL IMMUNITY

Petitioner misapprehends the District Court's decision to dismiss his claims against the Exchange insofar as he contends that the dismissal was based on some reason in addition to arbitral immunity. Pet. at 5-8. The District Court dismissed petitioner's claims based solely on its holding that the Exchange, and its employees, are protected from claims for civil liability under the doctrine of arbitral immunity.

As the District Court recognized, "[b]ased primarily on the 'functional comparability' of the arbitrator's role in a

contractually agreed upon arbitration proceeding to that of his judicial counterpart, the Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity." Pet. at B-3 (quoting *Austern v. Chicago Bd. Options Exch.*, 898 F.2d 882, 886 (2d Cir.), *cert. denied*, 498 U.S. 850 (1990) (citing decisions from the Ninth, Eighth, Fifth, Sixth, Seventh, and Third Circuit Courts of Appeals)). As these courts have held, "[a]s with judicial and quasi-judicial immunity, arbitral immunity is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants." *Austern*, 898 F.2d at 886 (quoting *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982)).

The District Court, by dismissing petitioner's claims, merely adhered to the unremarkable proposition adopted by the Courts of Appeals that have ruled on the issue that arbitral immunity extends to a "sponsoring organization . . . for all functions that are integrally related to the arbitral process." *Austern*, 898 F.2d at 886. Indeed, such an extension "is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended . . . is illus[ory]. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring organization." *Corey*, 691 F.2d at 1211; *see Ozark Air Lines*, 797 F.2d at 564 (quoting *Corey*).

As the Court of Appeals for the Second Circuit stated, not to extend immunity to a sponsor of arbitration "would merely serve to discourage its sponsorship of future arbitrations -- a policy that is strongly encouraged by the Federal Arbitration Act." *Austern*, 898 F.2d at 886. Following this reasoning and the uniform rulings of the Courts of Appeals, the District Court correctly held, and the Second Circuit affirmed, that the Exchange and its employees were "immune from civil liability" with regard to petitioner's claims arising out of the arbitration between petitioner and Merrill Lynch. Pet. at B-3.

II.

THE DISTRICT COURT'S DECISION WAS IN ACCORDANCE WITH UNIFORM PRECEDENT AMONG THE COURTS OF APPEALS AND IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

The District Court's application of arbitral immunity to the Exchange, as the sponsor of an arbitration, does not conflict with any decision of the Courts of Appeals. Indeed, the District Court's decision was in accordance with the holding of every Court of Appeals that has addressed the issue of whether arbitrators enjoy immunity from civil liability for claims related to their role in an arbitration proceeding and whether such immunity extends to entities that sponsor arbitrations. Thus, no split of authority or unresolved issue of pressing importance exists among the Courts of Appeals as a result of the Court of Appeals' affirmance of the District Court's decision.

Moreover, the District Court's decision is entirely consistent with the doctrine of "functional comparability" as articulated by this Court in its decisions concerning quasi-judicial immunity. *See Butz v. Economou*, 438 U.S. 478, 511-17 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Yaselli v. Goff*, 275 U.S. 503 (1927). The reasoning set forth in *Butz* and *Imbler* is responsible for the genesis of the doctrine of arbitral immunity. *See Austern*, 898 F.2d at 886 (citing the decisions of the Courts of Appeals which refer to the "functional comparability" of arbitrators with judges in recognizing arbitral immunity); *cf. Forrester v. White*, 484 U.S. 219, 227 (1988) (immunity from civil liability is "justified and defined by the functions it protects and serves, not by the person to whom it attaches"), *cited in Austern*, 898 F.2d at 886. Not surprisingly, this same reasoning is the basis for the decisions of the Courts of Appeals extending arbitral immunity to sponsors of arbitrations. *See Austern*, 898 F.2d at 886; *Ozark Air Lines*, 797 F.2d at 564; *Corey*, 691 F.2d at 1211.

Thus, the District Court's decision was based on its application of uniform and settled precedent among the Courts of Appeals and is neither in conflict with any decision of any Court of Appeals nor inconsistent with any decision of this Court. For these reasons, it is inappropriate for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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